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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RICKY RAY RECTOR — PETITIONER

V.

WINSTON BRYANT, Attorney General,
State of Arkansas and
A.L. LOCKHART, Director,
Arkansas Department of Correction — RESPONDENTS

ON WRIT TO CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents respond to petitioner's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

JURISDICTION

Respondents acknowledge that this Court has discretionary jurisdiction to review this case pursuant to 29 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS APPLIED THE PROPER TEST IN EVALUATING WHETHER THE PETITIONER HAS THE REQUISITE MENTAL CAPACITY TO BE PUT TO DEATH.

Rector first argues that the lower courts erred in denying him habeas corpus relief because they did not apply the proper test in determining whether he has the requisite mental capacity to be put to death. Rector notes that the lower courts applied the test articulated by Justice Powell in a concurring opinion in the case of Ford v. Wainwright, 477 U.S. 399 (1986). Rector argues that they should have applied the standard set forth in the American Bar Association Criminal Justice Mental Health Standards 7-5.6(b). The respondents assert that the lower courts applied the proper standard and that the denial of habeas corpus relief should be affirmed.

Rector's argument is based on the underlying argument that he is not presently competent to be put to death by the State of Arkansas. His claim is based on the holding in Ford v. Wainwright, supra, that it constitutes cruel and unusual punishment in violation of the Eighth Amendment to execute condemned criminals who are not competent.

After Rector raised his claim of incompetency to be executed before the District Court, that court ordered that he be sent to the United States Medical Center for Federal Prisoners (hereinafter MCFP) in Springfield, Missouri to be

evaluated as to his mental competency. The MCFP contacted the District Court after Rector was received there and inquired as to the standard that applied to the determination of Rector's competency to be executed. The MCFP noted that the standard announced by the Supreme Court in Ford v. Wainwright, supra, and the standard adopted by the American Bar Association on this issue. In response to the inquiry by the MCFP, the District Court entered an order indicating that the standard of Ford v. Wainwright governed the resolution of Rector's claim but directed the MCFP to evaluate Rector under both standards. In its final report, the MCFP concluded that Rector was competent to be executed under the standard of Ford v. Wainwright but that he would not satisfy the standard for competency under the American Bar Association test.

In Ford V. Wainwright, this Court reiterated that the Eighth Amendment prohibits the execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." Ford, 477 U.S. at 417. In an opinion concurring in part and concurring in the judgment and thus creating a majority, Justice Powell indicated that he would hold that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 477 U.S. at 422. The Court cited this standard approvingly in Penry v. Lynaugh, 492 U.S. ___, 109

S. Ct. 2934, 106 L.Ed.2d 256, 287-88 (1989) (addressing the issue of execution of the mentally retarded and holding that the Eighth Amendment does not prohibit their execution).

Applying the test of Ford v. Wainwright, the question is whether Rector is aware of the punishment he is about to suffer and why he is about to suffer it. The MCFP found that Rector was competent under this standard. The final report issued by the MCFP reads as follows:

> In each instance when Mr. Rector was interviewed, he had a basic, rational understanding of the reason why he was on death row. Mr. Rector also appeared to understand that the consequence of that conviction was that he was sentenced to die. Mr. Rector also stated on a number of occasions that he preferred to die rather than endure the conditions on death row in the Arkansas Penitentiary. In the opinions of the undersigned examiners, Mr. Rector satisfies the competency standard contained in Ford v. Wainwright. That is, it appears that no mental illness or defect prevents Mr. Rector from being aware of his impending execution and the reason for it.

See Final Forensic Report dated August 8, 1989, which was admitted as Petitioner's Exhibit 1 at the hearing before the District Court. It is clear that Rector is aware of the fact that he is sentenced to die and why he was so sentenced. As such, he meets the test of competency announced in Ford v. Wainwright.

The American Bar Association standard states that:

> A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the Court.

In its final report, the MCFP noted that:

> With respect to the second standard of competency, in the opinions of the undersigned examiners, it is appears that Mr. Rector meets the first portion of that standard. That is, it appears that he is able to understand the nature of the pending proceedings, what he was tried for, the reason for the punishment and the nature of the punishment. Mr. Rector's organic condition however, would interfere with him satisfying the remaining aspects of that standard. In the opinions of the undersigned examiners, Mr. Rector would have considerable difficulty due to his organic deficits in being able to work in a collaborative, cooperative effort with an attorney. In our opinions it appears that he would not be able to recognize or understand facts which might be related to his case which might make his punishment unjust or unlawful.

See Final Forensic Report dated August 8, 1989, which was admitted as Petitioner's Exhibit 1 at the hearing before the District Court.

The District Court concluded that it was bound by the standard of competency set forth in the Ford case. The District Court noted that:

> Although the Springfield team made an evaluation under the standards

> promulgated by the Supreme Court in Ford v. Wainwright, 477 U.S. 399 (1986) and also the American Bar Association, I am bound by the former standards. While the latter are interesting, they have no legal effect.

Rector v. Lockhart, 727 F.Supp. 1285, 1292 (E.D. Ark. 1990). See Petitioner's Appendix B at B8. The Eighth Circuit agreed that the standard articulated in Ford controlled the District Court's decision in this case and that the District Court had acted correctly in rejecting the ABA standard. Rector v. Clark, 923 F.2d 570, 572-73 (8th Cir. 1991). See Petitioner's Appendix A at A3-A4.

The respondents assert that the standard that governs the determination of Rector's sanity is the standard set forth by the Court in Ford. While it might be appropriate for the states to afford greater protection to prisoners sentenced to death by adopting the standard for determining sanity approved by the American Bar Association, that question would best be left to the legislative bodies of the various states. As Rector notes, Arkansas has adopted a statute making it illegal to execute the insane. See Ark. Code Ann. § 16-90-506(d) (1987). However, that statute does not define sanity for purposes of execution.

Rector argues in his petition that "evolving standards of decency" permit this Court to substitute the ABA standard in place of the Ford v. Wainwright analysis. Rector argues that because language "conceptually identical" to the ABA standard has been twice proposed before the United States

Senate and passed on July 1990 before being deleted from the legislation by a conference committee, it "is a standard which society is choosing to endorse." The respondents cannot agree that this proposed standard has been endorsed by society as Rector suggests.

The American Bar Association standard has not been adopted by any court that the respondents can find. Moreover, it is in conflict with the language of Ford v. Wainwright, which is set out above. The respondents assert that it would be inappropriate for this Court to graft a requirement onto the standard for determining competency to be executed relating to the convicted person's ability to assist counsel in attacking his punishment. Collateral challenges to convictions and sentences, especially in death cases, involve a review of the proceedings that occurred at trial. These challenges are invariably technical factual and legal arguments of which the inmate would have little understanding, much less an ability to assist counsel in constructing them. As such, the respondents assert that this Court should apply the standard articulated in Ford v. Wainwright and must affirm the denial of habeas corpus relief.

II.

THE LOWER COURTS PROPERLY FOUND THAT THE PETITIONER WAS COMPETENT TO STAND TRIAL.

Rector next argues that his capital murder conviction should be set aside because he was not competent to stand

trial. He argues that he did not have the ability to consult with counsel and, therefore, should not have been required to stand trial.

Rector argues that despite the trial court's finding to the contrary, he was not competent to be tried for capital murder in 1982. The respondents assert that the trial court's finding of competency is entitled to a presumption of correctness and that the lower courts properly denied habeas corpus relief.

In the case of Davis v. Wyrick, 276 F.2d 1197, 1201 (8th Cir. 1985), this Eighth Circuit noted that:

> [t]he test for determining whether an accused is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." (citations omitted)

The Court went on to note that:

> [s]ince competency to stand trial is a factual issue, we must presume the state court's findings to be correct unless they can be faulted for one of the reasons listed in 28 U.S.C. § 2254(d)." Beans v. Black, 757 F.2d 933, 935 (8th Cir. 1985); Maggio v. Fulford, 462 U.S. 111, 117, 103 S. Ct. 2261, 76 L.Ed.2d 794 (1983) (per curiam).

Davis, 766 F.2d at 1201. See also Wright v. Minnesota, 833 F.2d 746, 748-49 (8th Cir. 1987). Although Rector challenges the application of the presumption of correctness to the state court's finding that he was competent to stand

trial, he has failed to overcome the presumption based on any of the factors outlined in 28 U.S.C. § 2254(d).

Rector raised the issue of competency to stand trial before the trial court and a hearing on this issue was held. (T. 95-197) See Petitioner's Exhibit 9 and Respondent's Exhibit 3 submitted at the evidentiary hearing before the District Court. In ruling on this issue, the trial court also considered evidence which had been submitted for its consideration in connection with a first degree murder charge that was also heard before the court prior to Rector's capital murder trial. A copy of the transcript of the competency hearing held in the first degree murder trial was submitted to the court at the evidentiary hearing. See Petitioner's Exhibit 8 admitted at the hearing before the District Court.

At the competency hearing held in connection with the first degree murder trial, Dr. Mary Kaczewski, a psychiatrist; Dr. Douglas A. Brown, a psychologist; and Ron Heller, counsel for Rector, testified on Rector's behalf. Testifying on behalf of the State were Sakina Drummond, a speech pathologist; Dr. Charles Mallory, a clinical psychologist at the State Hospital; and Dr. Sayed Hamed, a psychiatrist at the State Hospital.

After this hearing, the trial court found that Rector was competent to stand trial. The trial court ruled as follows:

As the Court understands it, the defendant must have the ability to understand the nature of the charges against him, and I believe there is no conflict in the testimony from any of the witnesses that he does understand the nature of the charges; that he does understand what a murder charge is; that he does know what the punishment for it is; that he does understand the seriousness of the matter.

And the second boils down to a question of whether or not he can assist counsel. And in reviewing case law in preparation for this hearing, cases that I find say that amnesia alone is not a sufficient cause, if you will, or not a sufficient grounds to find that the defendant cannot assist his counsel. In this particular instance we have a mildly retarded defendant -- and, once again, mild mental retardation is not grounds for immunity from prosecution -- who could not understand complex legal issues if he's mildly retarded, I'm sure. That's for his attorneys to understand. (sic) -- who develops amnesia as a result of a self-inflicted gunshot wound.

Based on the case law, that amnesia is not grounds for holding that the defendant cannot assist counsel in his defense. The Court has no other alternative than to say that the defendant can assist counsel as that is defined in the case law. Assistance of counsel is not necessarily the establishment of alibi or something along that line, and so the motions will be denied.

Petitioner's Exhibit 8 at 258-59.

In his appeal from his first degree murder conviction, Rector raised the issue of his competency to stand trial and the Arkansas Supreme Court rejected his argument as follows:

First, trial counsel filed a pre-trial motion asking the court to find Rector mentally incompetent to stand trial as a result of brain injury caused by Rector's having shot himself some time after he killed Criswell. At the hearing on the motion the expert testimony was in conflict. The defense witnesses testified that Rector's brain injury caused retrograde amnesia, so that he could not remember either having shot himself or having committed the crime now on trial and other felonies at about the same time. Those witnesses considered Rector to be unable to understand the issues to be tried and to assist his counsel in his own defense. For the State the expert witnesses testified essentially to the contrary, with Dr. Hamed expressing the opinion that Rector was lying about his loss of memory, that he was competent to stand trial, and that he could cooperate with his counsel when he decided to do so. With the evidence hopelessly in conflict upon the issue of fact, it cannot be said that the trial judge's conclusion is clearly erroneous. The trial judge apparently accepted the claim of amnesia, but he correctly pointed out that amnesia is not an adequate ground for holding a defendant incompetent to stand trial. Deason v. State, 263 Ark. 56, 562 S.W.2d 79 (1978).

Rector v. State, 277 Ark. 17, 18, 638 S.W.2d 672, 673 (1982).

At the competency hearing held in connection with Rector's capital murder trial, Dr. Douglas A. Stevens, a psychologist; and Dr. Douglas A. Brown, the same psychologist who testified at the first trial, testified on Rector's behalf. Testifying on behalf of the State were Dr. John Hall, a psychologist with the State Hospital; Dr. Gregory Kaczewski, a psychiatrist with the State Hospital;

Dr. Joe Alford, a psychologist with the State Hospital; and Dr. Sayed Hamed. Again, the testimony was in conflict as to whether Rector was competent to stand trial. However, the trial court found that Rector was competent. The trial court ruled as follows:

> The Court, then, will make a determination that the defendant is competent to stand trial and is competent to aid in his own defense on a criminal charge involving a capital felony type offense.

See Petitioner's Exhibit 9 at 186.

This issue was raised by Rector in his direct appeal to the Arkansas Supreme Court and the trial court's finding that Rector was competent to stand trial was affirmed. The court explained as follows:

> A second argument for reversal is that the trial judge should have found Rector incompetent to stand trial against the death penalty. A parallel question of competency was decided adversely to Rector on his earlier appeal from his conviction for the murder of Arthur Criswell. Rector v. State, 277 Ark. 17, 638 S.W.2d 672 (1982). The proof in the two cases is quite similar, although in this case a witness for the State, Dr. Hamed, thought that Rector's condition was much improved as compared to the time Dr. Hamed saw Rector soon after his surgery.
>
> The expert proof is in sharp conflict, as it was on the other appeal. It is argued, however, that it takes a higher degree of competency to defend against the death penalty; so the two appeals are distinguishable. No

> doubt the issues may be more extensive in a death case, in which aggravating and mitigating circumstances are involved, but we do not discern any basis in the testimony for relating Rector's mental condition to the defense of a capital charge in particular. We must conclude, as we did on the earlier appeal, that the trial judge's decision is not clearly erroneous.

Rector v. State, 280 Ark. 385, 397, 659 S.W.2d 168, 174 (1983).

The District Court summarized the evidence heard by the trial court as follows:

> Six expert witnesses testified in the competency hearing on October 25, 1982 before Circuit Judge George F. Hartje. Two psychiatrists and two psychologists testified for the State. Two psychologists testified for the defense. Dr. Douglas A. Brown for the defense testified that in his opinion "Ricky is not competent to assist meaningfully in his defense of his own life in a capital case." On cross-examination he testified as follows:
>
> Q. He still understands the nature, seriousness and consequences of his actions?
>
> A. Yes, I believe he does.
>
> Q. He understands the punishment?
>
> A. He understands it in an intellectual level, yes.

PX 9, pp. 115-16.

Dr. Stevens, the other psychologist who testified for the defense, was present during the testimony of Dr. Brown. He agreed with Dr. Brown that Rector was not able to assist in his defense because of diminished mental ability. He testified that "I think the critical thing is that he has no seeming memory for the events associated with this trial, and the report that he gives me is bizarre." (PX 9, p. 125).

The testimony that Rector was not able to assist in his own defense was flatly contradicted by the State's

experts. Dr. John Anthony Hall, a psychologist, testified as follows:

> A. I think he's capable of assisting in his defense. Again, he seems to be able to express himself quite openly. His defense seems to be fairly clearly stated to us that he doesn't remember anything. He was able to express that quite clearly. Oh, I believe that there is no emotional interference with his defense -- with his assisting in his defense.

PX 9, p. 137.

Dr. Gregory Kaczewski, a psychiatrist, gave his opinion as follows:

> Q. ....Doctor, do you have an opinion about whether or not Mr. Rector is capable of assisting his counsel in his defense of the charges now pending against him that carry with it the potential death penalty?
>
> A. I believe that Mr. Rector is competent and is capable of assisting his defense attorney in his own defense. I did not see him as apathetic and unemotional as some of the other people have seen him.

PX 9, p. 151. Dr. Kaczewski was of the opinion that Rector was faking in some of the interviews and tests. (PX 9, pp. 156-57). He further testified as follows:

> Q. Do you feel that he understands the nature of the charges and the proceedings that he's involved in right now?
>
> A. Yes.
>
> Q. And the seriousness of it?
>
> A. Yes, sir.
>
> Q. And the consequences that could potentially flow from it?
>
> A. Yes, I do.

PX 9, pp. 161-62.

Dr. Joe Alford, a psychologist, testified as follows for the State:

> Q. Let me ask you, when you were doing that, did you have occasion to discuss with him the nature of the charges that are pending against him now?
>
> A. Yes. That was part of the -- the battery was a competency screening test where I asked him about, uh, different things about the nature of the proceeding, roles people take and things like that.
>
> Q. Did he understand?
>
> A. It was my opinion that he had a good understanding of the nature of the charges, the consequences of what could happen to him as a result of those charges, and that he had a good understanding of what people did, you know, in fairly general terms not in really specific terms, of what people do in court.

PX 9, p. 168.

Dr. Sayed Hamed, a psychiatrist, was the last expert witness for the State. He was the principle examining psychiatrist at the Arkansas State Hospital where Rector had been referred for evaluation. His opinion is summarized in the following answer on direct examination:

> My opinion is that Mr. Ricky Rector understands well the nature of the charges and the proceedings taken against him and is capable of cooperating with an attorney in a rational manner in the preparation of his defense...

PX 9, p. 181.

Rector, 727 F.Supp. at 1288-89. See Petitioner's Appendix B at B4-B5.

Although Rector argues that he presented convincing evidence to the District Court establishing that he was not competent to stand trial, it is clear that his expert evidence was merely a rehash of the testimony presented to the trial court. The District Court noted:

> The testimony of Drs. Stevens and Brown given before me was simply a reiteration of their testimony at the competency hearing held on October 25, 1982.

Rector, 727 F.Supp. at 1289-90. See Petitioner's Appendix B at B5-B6. The District Court rejected the testimony of Rector's lay witnesses, Heller, Stripling and Rector's sister, noting that:

> When the testimony of these three witnesses is juxtaposed against the testimony of the four highly qualified experts who testified at prior (sic) to Rector's 1982 state trial, I am not impressed.

Rector, 717 F.Supp. at 1291. See Petitioner's Appendix B at B7. Finally, Rector suggests that the report of the MCFP supports his argument that he was not competent to stand trial in 1982. However, as the District Court properly noted, Dr. Reuterfors, a clinical psychologist at the MCFP, testified by deposition and specifically stated that he could not say whether Rector had been competent to stand trial in 1982 because he did not evaluate Mr. Rector on that question. Rector, 727 F.Supp. at 1290. See Petitioner's Appendix B at B6. After reviewing all the evidence before it, the District Court not only found that the presumption of correctness applied but also stated, "I find independently that Ricky Ray Rector was competent to stand trial for the capital murder of Officer Bob Martin." Rector, 717 F.Supp. at 1291. See Petitioner's Appendix B at B7.

The Eighth Circuit affirmed the District Court's denial of habeas corpus relief. The Eighth Circuit agreed that the presumption of correctness was properly applied to the trial court's finding that Rector was competent to stand trial and that nothing in the MCFP's 1989 report supported his argument that he was not competent to stand trial in 1982. Rector v. Clark, 923 F.2d at 573. See Petitioner's Appendix A at A4.

Based on the foregoing, the respondents assert that there is ample evidence supporting the trial court's decision finding Rector competent to stand trial and that when the presumption of correctness is applied to the trial court's factual determination, as it should be, this Court must affirm the lower courts' denial of habeas corpus relief.

CONCLUSION

The Rules of the Supreme Court state that review of writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The two points raised by the petitioner did not demonstrate that constitutional error has occurred. Therefore, for the reasons and authorities cited above, respondents respectfully pray that this Court deny review on writ of certiorari.

Respectfully submitted,

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